

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KENNETH L. DIKE)	
Claimant)	
)	
VS.)	
)	
INTERSTATE BRANDS CORP.)	
Respondent)	Docket No. 1,012,809
)	
AND)	
)	
KEMPER INSURANCE)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the June 6, 2006, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury which arose out of and in the course of his employment with respondent. Accordingly, the ALJ ordered respondent and its insurance carrier (respondent) to pay temporary total disability compensation commencing April 5, 2003, to April 13, 2003, and April 29, 2003, to October 23, 2003. The ALJ also ordered respondent to pay for medical treatment for claimant by Dr. Steve Peloquin until further order or until claimant is certified as having reached maximum medical improvement.

Respondent argues that the ALJ exceeded his jurisdiction in this matter. Respondent contends that claimant did not provide timely notice of this accident pursuant to K.S.A. 44-520. If the Board determines that claimant provided adequate notice, respondent asserts that it is not responsible for claimant's treatment after October 24, 2003, because claimant suffered intervening injuries through his continued employment as a self-employed truck driver.

In its brief to the Board, respondent also raises a question concerning claimant's credibility, asserting that "claimant has testified twice in this workers compensation matter"

and “[h]is testimony is inconsistent”¹ However, the record contains only claimant’s testimony at the June 5, 2006, Preliminary Hearing. Although respondent’s brief makes repeated references to “Claimant’s Depo.” that was allegedly taken in November 2004, there is no such transcript in the administrative file. The Board’s review is limited to the record considered by the ALJ.²

Claimant responds that he gave timely notice of his injury and/or aggravation to respondent. He asserts that he suffered a compensable injury through a series of traumas that aggravated a preexisting condition. Claimant, therefore, requests that the ALJ’s Order for Compensation be affirmed in its entirety.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent as a driver of an 18-wheel truck in 1999. He would drive cross-country with a partner, and they would alternate driving and sleeping. He testified that he was also required to load and unload his product, which consisted of moving a ramp that weighed from 100 to 110 pounds out of the trailer, then rolling metal racks with baked products down the ramp. The racks, when loaded, could weigh up to 1,800 pounds.

On April 5, 2003, while he was home, he was awakened from a deep sleep at 5:30 a.m. with shooting pains from his hip to his knee. He had his wife take him to the emergency room. While claimant was in the emergency room, he had his wife call respondent to let it know where he was and that he would be absent from work. When his wife called, the doctors did not know what was wrong, so she did not report the condition as being work related.

Claimant returned to work on Monday, April 14. He said that on the 14th he felt better, but within a few days he could not stand to drive the truck because of his back pain. At one point, his co-driver drove the complete run. Claimant told his supervisor, Greg Pendlay, that driving and loading and unloading the truck aggravated his back. He was taken off work on April 24, and respondent sent him to see Leighton York, ARNP. Mr. York referred him to Dr. Kris Lewonowski, who referred him to Dr. Nanda Kumar. Claimant was eventually referred to Dr. Peloquin, who treated him with epidural injections and nerve blocks. At some point, he was told by his doctors that the work he did driving and lifting was the cause of his back problems.

¹ Brief of Appellant Respondent and Insurance Carrier filed July 17, 2006, at 5.

² K.S.A. 44-555c(a).

Sometime before April 24, 2003, Mr. Pendlay, asked claimant if he been injured at home, and claimant said he did not think so. He told Mr. Pendlay that he thought he had been injured at work. Mr. Pendlay asked whether there had been a specific incident, but claimant told him there was no one incident. He did not tell Mr. Pendlay how he had been injured. When claimant told Mr. Pendlay that he had been injured, he was told that he would have to deal with someone in personnel.

After this conversation with Mr. Pendlay, claimant talked to someone in personnel, whose name he could not remember. He turned in the off-work slips from the doctor but did not say how he had injured his back because he still did not know. He filled out an accident report and turned it in to the person in personnel on May 12, 2003.

On May 9, 2003, Mr. Pendlay filed his Supervisor's Accident Investigation Report. On that form, Mr. Pendlay noted:

"[Claimant] called me 2 weeks ago. Needed time off because of back problem. He stated it was not work comp. His doctor told him it was due to being overweight. Came to my office 5-9-03 and said he wanted to file work comp. His dr. said to since he didn't have this problem before working here."³

Claimant was off from April 24 to October 23, 2003. He worked for respondent until November 12, 2004, and then quit to operate his own trucking business, Rocking K Transport (Rocking K). He hoped to be able to drive without doing any of the loading and unloading. Rather than a cab-over, he drove a conventional truck, which was less jarring. While he was working for Rocking K, he noticed his back condition worsening. He was also having problems with side effects from the medications he was on. He continued this business less than a year and then quit because the driving was bothering his back. Claimant currently works for Lexinet doing production work. He said his job with Lexinet involves minimal lifting. Although his current job aggravates his back condition, he is now able to take breaks.

The Board finds claimant suffered personal injury by a series of accident that arose out of and in the course of his employment with respondent. Whether claimant gave notice within ten days of his series of accidents depends upon two things: claimant's date of accident and which conversation or writing first constituted notice of accident. Although the ALJ found claimant suffered a work-related accident and that notice was timely, he did not make any findings as to the date of accident or the date notice was given.

³ P.H. Trans., Resp. Ex. A at 3.

Claimant initially alleged his back injury resulted from “repetitive work” from “January 2002, to and including April 4, 2003.”⁴ He subsequently claimed a “series through 4/24/03.”⁵ Claimant began working for respondent in 1999. He started receiving treatment for low back pain in 2002. He even missed work due to low back pain in April 2002. On April 5, 2003, he awoke with back pain severe enough to cause him to seek medical treatment at the hospital’s emergency room. Claimant was unable to work again until April 14, 2003. He worked only a few days before taking off work again on April 24, 2003. He then remained off work until October 24, 2003, when he returned to full duty with respondent. On November 12, 2004, claimant quit his job with respondent and started working for himself, still as a truck driver but without doing the heavy loading and unloading work he had performed for respondent. Nevertheless, the truck driving aggravated his back symptoms, and he eventually stopped truck driving altogether. This scenario presents several possible accident dates.

Our appellate courts have repeatedly proclaimed a preference for setting the accident date as late as possible in cases involving repetitive traumas and a series of accidents. In *Treaster*⁶, the court reaffirmed the last day worked rule first announced in *Berry*⁷, but added that if the job changes to an accommodated job that ends the offending activity, then the date of accident is the last date claimant performed the offending activity, *i.e.*, the last day he performed his regular, unaccommodated job duties.

Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant’s continued pain and suffering [*sic*], the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.⁸

In *Kimbrough*⁹, our Supreme Court reiterated that an injured worker should not be penalized for attempting to work through pain. In that case, the date of accident for a worker who continued to work in the same position even after the initial injury was the last day worked before the workers compensation hearing. Applying these principles to this case, the last day claimant performed his regular job duties for respondent was

⁴ Form K-WC E-1, Application for Hearing filed September 17, 2003.

⁵ Form K-WC E-3, Application for Preliminary Hearing filed May 5, 2006.

⁶ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 611, 987 P.2d 325 (1999).

⁷ *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

⁸ *Treaster*, 267 Kan. 611, Syl. ¶ 3.

⁹ *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

November 12, 2004. As respondent admits that claimant gave notice no later than May 12, 2003, when he completed the Employee Statement of Injury or Illness form,¹⁰ then notice of the series of accidents was timely given.

Respondent argues that claimant suffered a new injury while working for himself as a truck driver after he quit his job with respondent. Presumably, claimant would deny that he sustained any new injury. Even though he eventually quit truck driving altogether as a result of his back symptoms, claimant attributes those symptoms and his current condition solely to his work with respondent. The ALJ's order is silent as to this issue, but as medical treatment was ordered paid by respondent "until further order or until certified as having reached maximum medical improvement,"¹¹ by implication the ALJ did not find claimant to have suffered any subsequent accident and injury. Although claimant's brief is likewise silent as to the intervening injury issue, there is evidence that supports claimant's request for an award of ongoing medical treatment benefits against this respondent, in particular, the fact that claimant was able to self-limit his work activities while self employed. He did no lifting, only driving, and he was able to reduce the hours he drove as needed. In addition, he operated a truck that was less jarring than the ones furnished by respondent. Nevertheless, claimant's symptoms continued and worsened to the point that he quit truck driving altogether.

It is difficult to determine, based on the preliminary record compiled to date, whether claimant's symptoms represented a continuation of the injury he suffered with respondent or an aggravation which should be treated as a new series of accidents. Nevertheless, the fact that claimant was able to continue working as an over-the-road truck driver for almost a year with the subsequent employer, Rocking K Transport, indicates that the worsening should be treated as an intervening series of accidents and a new injury. The actual date claimant began driving for Rocking K is not clear but it was about the same time or shortly after he terminated with respondent. Therefore, respondent's liability for benefits will terminate as of the date he last was employed by respondent, November 12, 2004.¹²

WHEREFORE, it is the finding, decision and order of the Board that the Order for Compensation of Administrative Law Judge Brad E. Avery dated June 6, 2006, is affirmed as to the award of temporary total disability and medical benefits while claimant was employed by respondent, but the award of ongoing medical treatment is reversed. The award of preliminary benefits against this respondent shall terminate effective November 12, 2004.

¹⁰ P.H. Trans. (June 5, 2006), Resp. Ex. A.

¹¹ ALJ Order for Compensation (June 6, 2006).

¹² P.H. Trans. (June 5, 2006) at 27.

IT IS SO ORDERED.

Dated this _____ day of August, 2006.

BOARD MEMBER

c: Patrick M. Salsbury, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier